

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,)	Case No. 10-5086 SC
)	
Plaintiff,)	ORDER GRANTING APPLICATION
)	<u>FOR DEFAULT JUDGMENT</u>
v.)	
)	
ANTON ISON TORRES and FRANCES ISON)	
TORRES, individually, and d/b/a)	
KENKOY'S GRILL,)	
)	
Defendants.)	

I. INTRODUCTION

Plaintiff J & J Sports Productions, Inc. ("Plaintiff") seeks entry of Default Judgment against Defendants Anton Ison Torres ("Anton Torres") and Frances Ison Torres ("Frances Torres"), individually and doing business as Kenkoy's Grill (collectively, "Defendants"). ECF No. 15 ("Appl. for Default J."). Having considered the papers submitted, the Court concludes that entry of Default Judgment against Defendants is appropriate, and GRANTS Plaintiff's Application.

II. BACKGROUND

The following allegations are taken from Plaintiff's Complaint. Plaintiff is a California corporation with its

1 principal place of business in Campbell, California. ECF No. 1
2 ("Compl.") ¶ 6. Defendants are the owners and operators of
3 Kenkoy's Grill in Hayward, California. Id. ¶¶ 7-8. Plaintiff was
4 granted the exclusive, nationwide television rights to
5 "'Firepower': Manny Pacquiao v. Miguel Cotto, WBO Welterweight
6 Championship Fight Program," a November 14, 2009 closed-circuit
7 telecast of boxing matches and commentary ("the program"). Id. ¶
8 10. Plaintiff entered into sublicensing agreements that gave
9 commercial establishments in the hospitality industry the right to
10 publicly exhibit the program. Id. ¶ 11.

11 Plaintiff alleges that Defendants willfully and unlawfully
12 intercepted and exhibited the program at the time of its
13 transmission at Kenkoy's Grill. Id. ¶¶ 12-13. Plaintiff brings
14 this action alleging violations of 47 U.S.C. §§ 605 and 553,
15 conversion, and violation of California Business and Professions
16 Code §§ 17200, et seq. Id. ¶¶ 9-37.

17 18 **III. LEGAL STANDARD**

19 After entry of a default, the Court may enter a default
20 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
21 so, while discretionary, is guided by several factors. Aldabe v.
22 Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). As a preliminary
23 matter, the Court must "assess the adequacy of the service of
24 process on the party against whom default is requested." Bd. of
25 Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. 00-0395,
26 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001). If
27 the Court determines that service was sufficient, it should
28

1 consider whether the following factors support the entry of default
2 judgment: (1) the possibility of prejudice to the plaintiff; (2)
3 the merits of plaintiff's substantive claim; (3) the sufficiency of
4 the complaint; (4) the sum of money at stake in the action; (5) the
5 possibility of a dispute concerning material facts; (6) whether the
6 default was due to excusable neglect; and (7) the strong policy
7 underlying the Federal Rules of Civil Procedure favoring decisions
8 on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.
9 1986).

10
11 **IV. DISCUSSION**

12 **A. Service of Process**

13 Federal Rule of Civil Procedure 4(e)(2)(A) provides that an
14 individual may be served by delivering a copy of the summons and of
15 the complaint to the individual personally. Alternatively, Federal
16 Rule of Civil Procedure 4(e)(1) provides that an individual may be
17 served by following state law in the state where the district court
18 is located or where service is made. California law provides that,
19 in lieu of personal service,

20 a summons may be served by leaving a copy of
21 the summons and complaint at the person's . . .
22 usual place of business, or usual mailing
23 address . . . in the presence of a competent
24 member of the household or a person apparently
25 in charge of his or her office, place of
26 business, or usual mailing address . . . at
27 least 18 years of age, who shall be informed of
28 the contents thereof, and by thereafter mailing
a copy of the summons and of the complaint . .
. to the person to be served at the place where
a copy of the summons and complaint were left.

Cal. Civ. Proc. Code § 415.20(b). This method of service on a

1 natural person is available only after the exercise of "reasonable
2 diligence" proves ineffective in accomplishing service by personal
3 delivery. See id.

4 Here, copies of the summons and Complaint were delivered to
5 Anton Torres personally at Kenkoy's Grill on December 17, 2010.
6 ECF No. 6 ("Proof of Service on Anton Torres"). After four
7 attempts to serve Frances Torres at Kenkoy's Grill, service was
8 left with "Anttenet Doe" ("Doe"), the person in charge at Kenkoy's
9 Grill on December 23, 2010.¹ ECF No. 7 ("Proof of Service on
10 Frances Torres"). The process server estimates that Doe was
11 twenty-five years old. Id. Doe was instructed to deliver the
12 documents to Frances Torres. Id. On December 27, 2010, copies of
13 the summons, Complaint and other relevant documents were mailed to
14 Frances Torres at Kenkoy's Grill. Id. Accordingly, the Court
15 finds that service of process was adequate as to both Anton Torres
16 and Frances Torres.

17 **B. Default Judgment**

18 "The general rule of law is that upon default the factual
19 allegations of the complaint, except those relating to the amount
20 of damages, will be taken as true." Geddes v. United Fin. Group,
21 559 F.2d 557, 560 (9th Cir. 1977). Therefore, the Court accepts as
22 true the facts as presented in the Complaint. Plaintiff seeks
23 statutory damages under 47 U.S.C. §§ 605(e)(3)(B)(iii) & (c)(ii)
24 and compensatory damages under state common law conversion. See
25 ECF No. 15-1 ("Mem. of P. & A.") at 2.²

26 _____
27 ¹ Anttenet Doe refused to provide her last name.

28 ² Plaintiff's submissions to the Court in connection with this
application for default judgment make no claim for relief under

1 Here, the Eitel factors favor default judgment. If Plaintiff
2 is not granted default judgment, it will not be able to recover its
3 costs for its purchase of the exclusive distribution rights to the
4 program. This possibility of prejudice to Plaintiff supports
5 default judgment. Defendants have failed to defend this lawsuit
6 and have made no showing of excusable neglect.

7 Plaintiff's Complaint asserts claims under sections 605 and
8 553 of title 47 of the United States Code. Compl. ¶¶ 9-23.
9 Section 605 prohibits the unauthorized interception of radio or
10 satellite communications, and section 553 prohibits the
11 unauthorized interception of cable signals. See, e.g., California
12 Satellite Sys. v. Seimon, 767 F.2d 1364, 1366 (9th Cir. 1985); J &
13 J Sports Prods., Inc. v. Manzano, No. 08-1872, 2008 WL 4542962, at
14 *2 (N.D. Cal. Sept. 29, 2008) ("A signal pirate violates section
15 553 if he intercepts a cable signal, he violates section 605 if he
16 intercepts a satellite broadcast. But he cannot violate both by a
17 single act of interception.").

18 Here, Plaintiff contends that because Defendants have failed
19 to respond to the Complaint, Plaintiff cannot determine the precise
20 means Defendants used to receive the program unlawfully. Mem. of
21 P. & A. at 3. Plaintiff moves for statutory damages under section
22 605 only. See ECF No. 15-5 ("Proposed Order"). Given Defendants'
23 failure to participate in this litigation, the Court finds it
24 appropriate to award damages under 47 U.S.C. § 605.

25 Plaintiff has also adequately alleged a state law claim for
26 conversion. Plaintiff's Complaint is, therefore, sufficient, and

27
28 California Business and Professions Code §§ 17200 et seq. The
Court therefore considers Plaintiff to have abandoned this claim.

1 Plaintiff's claims appear to have merit. Plaintiff seeks statutory
2 damages of \$110,000 and conversion damages of \$2200. See Proposed
3 Order. As explained below, the Court has discretion to award a
4 lesser amount under section 605. Thus, the sum of money at stake
5 is not so large as to weigh against granting default judgment.
6 Overall, the Eitel factors weigh in favor of default judgment.

7 **C. Remedy**

8 1. Damages Under Section 605

9 Plaintiff seeks the maximum statutory damages of \$110,000
10 based on a willful violation of Section 605. App. for Default J. ¶
11 5. Under this statute, an aggrieved party "may recover an award of
12 statutory damages for each violation . . . in a sum of not less
13 than \$1,000 or more than \$10,000, as the court considers just." 47
14 U.S.C. § 605(e)(3)(C)(i)(II). If the "court finds that the
15 violation was committed willfully and for purposes of direct or
16 indirect commercial advantage or private financial gain, the court
17 in its discretion may increase the award of damages . . . by an
18 amount of not more than \$100,000 for each violation" Id. §
19 605(e)(3)(C)(ii). Here, because of the extreme unlikelihood that
20 Defendants inadvertently acquired the signal to display the fight,
21 coupled with Defendants' failure to appear in this lawsuit, the
22 Court finds that Defendants acted willfully and for the purposes of
23 commercial advantage. Therefore, enhanced damages are warranted
24 under section 605. See, e.g., Time-Warner Cable of New York City
25 v. Googies Luncheonette, Inc., 77 F. Supp. 2d 485, 490 (S.D.N.Y.
26 1999) (finding signal interception willful because "signals do not
27 descramble spontaneously, nor do television sets connect themselves
28

1 to cable distribution systems").

2 Courts in this circuit have granted widely varying awards
3 ranging from near the minimum statutory award of \$1,000 to near the
4 maximum of \$110,000, depending on such factors as the capacity of
5 the establishment, the number of patrons in attendance, and whether
6 a cover charge was required for entrance. See, e.g., J & J Sports
7 Prods., Inc. v. Cardoze, 2010 U.S. Dist. LEXIS 74606, at *13 (N.D.
8 Cal. July 9, 2010) (awarding \$1,250 in statutory damages for
9 willful interception and exhibition of boxing program); J & J
10 Sports Prods., Inc. v. Ferreyra, CIV S-08-128, 2008 WL 4104315, at
11 *1 (E.D. Cal. Aug. 28, 2008) (awarding \$100,000 where defendant was
12 a repeat offender). In Ferreyra, the court emphasized that a large
13 award was warranted because the defendant was on notice from a
14 prior lawsuit that pirating a commercial signal was unlawful. Id.
15 at *1.

16 Here, there is no evidence that Defendants are repeat
17 offenders. Defendants did not impose a cover charge, and there is
18 no evidence that the restaurant charged a premium for food and
19 drinks that night. ECF No. 15-3 Ex. 1 ("Poblete Aff."). The
20 report of Plaintiff's investigator John Poblete ("Poblete")
21 indicates that the program was displayed on four televisions and
22 was shown on an entire wall of the restaurant via a projection
23 machine. Id. Poblete estimates the capacity of the restaurant was
24 about eighty people. Id. He performed three headcounts during his
25 visit, counting forty-six, forty-eight, and fifty patrons present.
26 Id.

1 This Court previously entered default judgment against a
2 different restaurant for intercepting the same program at issue
3 here. See J & J Sports Prods. v. Marcaida, No. 10-5125, 2011 U.S.
4 Dist. LEXIS 58116, at *12 (N.D. Cal. May 31, 2011). In Marcaida,
5 the restaurant had a capacity of seventy-five, headcounts showed
6 approximately thirty-five patrons in attendance, the program was
7 displayed on two televisions, and there was no cover charge. Id.
8 at *2. The Court awarded damages under section 605 equal to three
9 times the cost the defendant would have paid to lawfully exhibit
10 the program. Id. at *12. Here, Kenkoy's Grill has about the same
11 capacity of the restaurant in Marcaida, but the program was
12 displayed on twice as many televisions and was displayed via
13 projector on an entire wall of the restaurant. Approximately ten
14 more patrons were in attendance. Accordingly, the Court finds that
15 a larger award is appropriate here. The Court awards Plaintiff
16 \$8,800 -- four times the cost Defendants would have paid to
17 lawfully exhibit the program.

18 2. Conversion

19 Plaintiff also seeks \$2200 in damages for its conversion
20 claim. Mem. of P.& A. at 15. Damages for conversion must be based
21 on the value of the property at the time of the conversion. See
22 Krueger v. Bank of America, 145 Cal. App. 3d 204, 215 (Ct. App.
23 1983). The rate to license the program for a venue with a capacity
24 of eighty people was \$2200. ECF No. 15-4 ("Pl.'s Aff.") Ex. 2.
25 Plaintiff has adequately pleaded a conversion claim, and so the
26 Court awards Plaintiff \$2200 in compensatory damages for
27 conversion.
28

3. Attorneys' Fees and Costs

Under section 605, recovery of full costs and attorneys' fees to the prevailing party is mandatory. 47 U.S.C. § 605(e)(3)(B)(iii). Here, Plaintiff has not provided an accounting of attorney fees or costs. Thus, the Court cannot award fees and costs at this time.

V. CONCLUSION

The Court GRANTS the Application for Default Judgment filed by Plaintiff J & J Sports Productions, Inc. against Defendants Anton Ison Torres and Frances Ison Torres. The Court awards Plaintiff a total of \$11,000. This award consists of \$8,800 in statutory damages under 47 U.S.C. § 605, and \$2,200 in compensatory damages for conversion.

If Plaintiff intends to seek attorneys' fees and costs, Plaintiff shall file its request, supported by an itemized accounting of fees and costs, within ten (10) days of this Order. Upon receipt and consideration of this declaration, the Court will enter judgment in an appropriate amount in favor of Plaintiff and against Defendants. Failure to timely file this declaration will result in a waiver of the request for fees and costs.

IT IS SO ORDERED.

Dated: August 24, 2011


UNITED STATES DISTRICT JUDGE